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No. 79-1912

In the Supreme Court of the United States

OCTOBER TERM, 1979

DANNY LEE FULTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630 3

Scott v. *United States*, 436 U.S. 128 4

United States v. *Reliable Transfer Co.*, 421 U.S. 397 3

Ybarra v. *Illinois*, 444 U.S. 85 ..... 3, 4

Zurcher v. *Stanford Daily*, 436 U.S. 547 4

Constitution and statutes:

United States Constitution:

First Amendment 4

Fourth Amendment 1

26 U.S.C. 5861(d) 1

26 U.S.C. 5871 1

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Petitioner contends that the warrantless search of his pickup truck violated the Fourth Amendment.

1. Following a jury-waived trial[1] in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of possession of a sawed-off shotgun, in violation of 26 U.S.C. 5861(d) and 5871. He was sentenced to one year in prison. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-6a).

The evidence adduced at the suppression hearing showed that shortly after midnight on June 28, 1979, weapons were fired toward a manufacturing plant in

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[1] The parties agreed that the outcome of the trial would be determined by the outcome of a suppression hearing held on September 28, 1979 (Pet. App. 7a).

Claiborne County, Tennessee, from a nearby area where a group of fifteen strikers and union supporters, including petitioner, were congregated (Pet. 3-4; Pet. App. 1a-2a). Plant security guard Robert Worsham heard two gunshots and saw "muzzle flashes" originating "right in the middle of the strikers" (Tr. 10-11).[2] He then heard six to eight more gunshots (Tr. 11). Deputy Sheriff Clyde Watson, who was sitting in a vehicle parked near the plant when the shots were fired, testified that the bullets passed several feet over him and struck the plant just above the entrance (Tr. 19-23).

Shortly thereafter, Chief Deputy Sheriff Norman Jesse, Investigator Arthur Ramsey, and several of the officers of the Claiborne County Sheriff's Office arrived at the scene (Tr. 24, 38). Jesse and Ramsey were shown the bullet holes in the plant and were advised that the firing had come from the strikers' location (Tr. 25, 34, 42, 73-74). Thereupon, Jesse, Ramsey and three other officers approached the strikers to investigate the shooting (Tr. 42). After the strikers stated that they had no information about the shooting (Tr. 42-43, 75), the officers commenced a search of the area, including six vehicles (Tr. 41-43). A carbine rifle that had recently been fired was found under a bus (Tr. 43-44). Another rifle was then found inside the bus, and two more rifles were recovered from an automobile (Tr. 44). Thereafter, a sawed-off shotgun was discovered hidden under a mattress in the camper unit on petitioner's pickup truck (Tr. 64-65, 78-79).

The district court denied petitioner's motion to suppress the shotgun (Pet. App. 7a-11a). It held that the officers had probable cause to believe that petitoner's truck contained a firearm because of the gunfire and that a search warrant was not required because of the exigent

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[2] "Tr." refers to the transcript of the suppression hearing.

circumstances involved—it was late at night, the nearest magistrate lived thirteen miles away, the situation was "potentially volatile" and the object of the search was a vehicle (Pet. App. 9a-10a).[3] The court of appeals agreed that the warrantless search was reasonable under the circumstances (Pet. App. 1a-3a). Judge Merritt dissented on the ground that there was "no evidence that the strikers fired more than one weapon" and therefore "no basis for a continuing search after the carbine was found" (Pet. App. 4a-6a).[4]

2. Petitioner's contention (Pet. 10) that there was no evidence supporting the reasonableness of the warrantless search of his vehicle is belied by the record. Moreover, this fact-bound question was resolved against petitioner in the two courts below, and further review by this Court is not warranted. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[5]

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[3]On the basis of the conflicting testimony of Deputy Sheriff Jesse and of petitioner and other defense witnesses, the district court ruled that the government had not established that petitioner had voluntarily consented to the search (Pet. App. 9a).

[4]The majority opinion, however, expressly ruled that "[i]t was reasonable for the officers to continue to search for other weapons after the carbine was found" (Pet. App. 2a). As the court explained (*ibid.*):

> * * * the witness to the shooting told the officers "they" had been firing shots and that he had seen several muzzle flashes. * * * Discovery of the carbine gave additional reason to seek other weapons since the officers then had reason to believe that the [strikers'] earlier disclaimer [of information about the gunfire] was false.

[5]Petitioner's contention (Pet. 8-9) that the decision below conflicts with the principle stated in *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979), that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable

Petitioner contends (Pet. 14-15) that a "higher standard of reasonableness" is required in this case to test the validity of the search because it involves a labor demonstration protected under the First Amendment. This contention is without merit. Contrary to petitioner's suggestion (Pet. 7, 11-12), the government conduct at issue here did not remotely implicate any First Amendment rights of the strikers. The search was directed at investigating violent criminal conduct, in a case where the risk of additional violence was present, not at regulating any legitimate union activity.

Petitioner's contention (Pet. 12-14) that a higher standard of reasonableness is required because Deputy Sheriff Jesse was also a part-time security employee of the struck company is similarly without merit. Even assuming that Jesse's conduct was influenced by his connection with the company, which was not shown by the record, the validity of a search is tested by the objective facts known by the officer at the time of the search, not by the officer's subjective intentions or motivations. See *Scott* v. *United States*, 436 U.S. 128, 135-138 (1978). Here, as the courts below found, the objective facts justified the search. Moreover, Jesse was only one of several officers who participated in the search, and it was another officer who discovered the shotgun in petitioner's truck (Tr. 64-65, 79).

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cause to search that person" is without merit. The record here amply establishes the existence of probable cause to believe that weapons were concealed in some of the strikers' vehicles. In *Ybarra*, by contrast, the police had no reason to suspect any of the persons in the bar other than the bartender. Accordingly, the vehicle searches here were valid whether or not there was probable cause to believe that any particular striker was responsible for the shooting. See also *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 556 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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